I N D E X

CITATIONS

Cases:

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 72-147

BOB BULLOCK, ET AL.,
Appellants

v.

DIANA REGESTER, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16(1) of the Rules of this Court, Dr. George Willeford, Chairman of the State Executive Committee of the Republican Party of Texas, Mr. Gene Diedrick, Chairman of the Executive Committee of the Smith County, Texas Republican Party, and Mr. Thomas G. Crouch, former Chairman of the Executive Committee of the Dallas County, Texas Republican Party, move that the appeal be dismissed, or, in the alternative, that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from an order of a three-judge District Court for the Western District of Texas holding that the State

legislative redistricting scheme for the State of Texas is unconstitutional and ordering immediate reapportionment of two of the State's 254 counties.

1. These cases involve the reapportionment of the Texas Legislature subsequent to and based on the 1970 Federal Census.

The Texas Constitution requires the State Legislature to apportion the state into senatorial and representative districts "at its first regular session after the publication of each United States decennial census" (Article III, Section 28; App. 175E[1]). If the Legislature fails to do so, "same shall be done by the Legislative Redistricting Board of Texas" (ibid.; App. 176E). In 1971 the Legislature adopted a redistricting plan for the State House of Representatives, but did not enact a plan for the State Senate (App. 9A).

On August 24, 1971, the Legislative Redistricting Board began deliberations to apportion the State into senatorial districts (App. 187F). A few weeks later the Texas Supreme Court held that the House redistricting plan was unconstitutional. Smith v. Craddick, 471 S.W.2d 375 (Tex. 1971), reproduced at App. 178F-185F. The Legislative Redistricting Board then refused to redistrict the House, asserting that it lacked the power, but the Texas Supreme Court issued a writ of mandamus ordering the Board to do so. Mauzy v. Legislative Redistricting Board, 471 S.W.2d 570 (Tex. 1971), reproduced at App. 186F-194F. Thereafter, the Board adopted redistricting plans for the Senate (on October

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[1]"App." refers to the separately-bound Appendix to the Jurisdictional Statement.

15, 1971) and for the House (on October 22, 1971). (App. 9A.)

2. Four separate cases were filed in four district courts challenging the Board's redistricting plans. On December 13, 1971, the Chief Judge of the United States Court of Appeals for the Fifth Circuit (Judge John R. Brown) ordered a three-judge court in each of the four cases, and consolidated the cases and transferred them to the Austin Division of the Western District of Texas. In view of the February 7, 1972, filing deadline for candidates for office, the parties agreed to expedite discovery and that any evidence heard in relation to any one case could be considered with regard to all of the cases. The three-judge court convened on January 3, 1972, and heard evidence for three and one-half days. (App. 3A-8A.)

Witnesses for the various plaintiffs presented evidence showing population deviations in the reapportionment scheme adopted by the Legislative Redistricting Board, and testified that the Board's plans discriminated against Negroes, Mexican-Americans, and other ethnic and political minorities, and also discriminated on the basis of wealth. Appellants called no witnesses and indicated that they believed that they had no obligation to justify the Board's reapportionment scheme. At the conclusion of the hearing on January 6, 1972, the court requested that all parties submit proposed alternative apportionment plans; several of the plaintiffs submitted plans, but appellants did not. (App. 8A, 14A, 19A-24A, 29A-31A, 40A-42A, 47A-53A, 61A-62A).

The court issued its comprehensive opinion (App. 1A-62A, 83A-109A) on January 28, 1972, more than a week before the filing deadline. It held that the 9.9 percent

population deviation[2] in the redistricting plan for the House of Representatives[3] was not supported by any rational and consistent state policy and did not reflect a "good faith attempt to achieve population equality as nearly as practicable," and ruled that accordingly the plan was unconstitutional (App. 13A, n. 5; see App. 9A-24A).

While this holding made it unnecessary "to decide other questions raised by the plaintiffs pertaining to the entire State of Texas," the court "fe[lt] compelled" to develop "some major points of consideration for the Legislature, specifically * * * regarding multimembered districts" (App. 24A, 25A). The evidence "clearly established" that "it simply costs more" for a candidate to run for office and to communicate with the electorate in multi-member districts than in similarly situated single-member districts (App. 27A). Although the metropolitan areas of the State consisted of "very similar urban electorates living in very similar geographic and demographic surroundings," they had been redistricted differently--Harris County, the largest

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[2]The 9.9 percent deviation was based on appellants' computations. The court below pointed out that the plaintiffs, using a different method, had calculated the total population deviation "as about 29.3%, rather than 9.9%," and noted as "significant" that the total deviation for two counties alone (Dallas and Bexar) was "a total of around 21,500 people" (App. 13A-14A, n. 5).

[3]The redistricting plan for the Senate was not challenged on the basis of population deviation, "although the total deviation is 4.5%, involving 16,213 people" (App. 8A, n. 3).

metropolitan area, was divided into single-member districts, while every other major metropolitan area was made a multi-member district (App. 30A). The court concluded that this difference in treatment amounted to an unjustified "classifying of candidates and their abilities to run [for office] and to form political associations according to wealth, affecting basically and unequally the poor, * * * and those not members of established political parties" (ibid.).

With reference to Dallas County, the court held that the multi-member districting scheme for the House tended "to dilute or cancel out the vote of Dallas County's Negro minority," and that therefore "the use of a multi-member district in Dallas County [is] unconstitutional" (App. 42A). In Bexar County, which includes San Antonio, the court found that Mexican-Americans were an "invidiously disadvantaged" minority group which had been "effectively removed from the political processes," and that the multi-member House district for Bexar County gave that group less opportunity to participate in elections successfully (App. 53A, 55A). It concluded that single-member districts were "constitutionally compelled" in San Antonio, since they would "obviously be of benefit in remedying the effects of past and present discrimination against Mexican-Americans" (App. 56A). The court rejected a claim that the Senate districts in Bexar County had been unlawfully gerrymandered to minimize the political strength of San Antonio Republicans (App. 56A-58A), and a claim that the Senate districts in Harris County improperly diluted the votes of the Negro minority (App. 58A-60A).

The court did not prescribe a new redistricting plan for the whole State, but

instead gave the Legislature until July 1, 1973, "to perform its functions of redistricting" (App. 61A). In Dallas and Bexar Counties, however, the court concluded that immediate relief was required in view of the "particularly compeling constitutional infirmities" shown there, involving "racial inequalities and hindrances," and accordingly adopted single-member redistricting plans for those counties (App. 62A).[4]

3. On February 1, 1972, appellants applied for a stay of judgment, claiming that if the redistricting of Dallas and Bexar Counties into single-member districts under the court's order was allowed to go into effect in the forthcoming elections, the restructuring of representation in those counties that would ensue could not be undone if this Court subsequently reversed the decision below. Mr. Justice Powell, noting that "the only present necessity to consider a stay relates to the District Court's decision with respect to multi-member districts in Dallas and Bexar Counties," denied the stay on February 7, 1972 (App. 199H, 197H-201H). The State election process consequently proceeded in accordance with the district court's decision; primary elections have been

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[4]The court set aside for the 1972 elections the requirement that candidates for the House reside in the single-member district to be represented, to facilitate the "transition from multi-member districts in Dallas and Bexar Counties to single-member districts" (App. 62A), and also ordered state officials to "adopt and implement any and all procedures necessary to properly effectuate the orders of this Court" (App. 64A). Appellants do not challenge either of these matters in this appeal.

conducted using the redistricting plan for the House found to be deficient, except in Dallas and Bexar Counties, where the primaries were held pursuant to the single-member districting plans adopted by the court.

ARGUMENT

The only issues raised by appellants are whether the court below erred in holding that the House redistricting plan for the whole State is unconstitutional or in ordering single-member districts for Dallas and Bexar Counties. We believe that these issues are not within the jurisdiction of this Court, and accordingly that this appeal should be dismissed. Alternatively, we contend that the district court correctly determined these issues by applying settled principles to the particular facts of this case, and that plenary review of its decision is not warranted.

1. Section 1253 of Title 28, United States Code, circumscribes in precise terms this Court's jurisdiction of direct appeals from three-judge courts: " * * * [A]ny party may appeal to the Supreme Court from an order granting or denying * * * an interlocutory or permanent injunction in any civil action * * * required by any Act of Congress to be heard and determined by a district court of three judges." The order of the district court declaring unconstitutional the redistricting plan for the entire State did not grant or deny any injunction. The court explicitly refrained from doing so, instead allowing the State Legislature until July 1, 1973, "to perform its functions of redistricting" (App. 61A). Since the court below "has issued neither an injunction, nor an order granting or denying one," this Court has "no power under §1253 * * * [to] deal with the merits

of this case" as concerns the plan for the State as a whole. Gunn v. University Committee, 399 U.S. 383, 390 (1970) (footnote omitted).[5] See, also, Whitcomb v. Chavis, 403 U.S. 124, 138 n. 19 (1972); Unborn Child v. Doe, 402 U.S. 936 (1971); Smith v. Garza, 401 U.S. 1006 (1971); McCann v. Babbitz, 400 U.S. 1 (1970); Hutcherson v. Lehtin, 399 U.S. 522 (1970); Dial v. Fontaine, 399 U.S. 521 (1970).

Nor are the district court's orders prescribing single-member districts for Dallas and Bexar Counties appealable under Section 1253. Those orders were premised on the "particularly compeling constitutional infirmities" (App. 62A) found to exist in those two counties but not shown to exist elsewhere. And the multi-member districting scheme used for Dallas and Bexar Counties was not part of a uniform plan; instead, multi-member districting was used, it was indicated, because of the special needs and wishes of the people in those two counties, and there was no overall statewide plan (see App. 19A-21A, 31A-35A). The evidence showed that each legislative district in the State was constructed as an independent, autonomous unit, based on the peculiar circumstances which the Legislative Redistricting Board determined existed there. Furthermore, the court's orders affect only two (Dallas and Bexar) of the

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[5]As the Court pointed out in Gunn, even if the action of the district court could be considered a denial of an injunction because the injunctive relief sought was not forthcoming, there still would be no jurisdiction in this Court since "appellants could not appeal from an order in their favor" (399 U.S. at 390, n. 5).

State's 254 counties, and 29 of the 150 seats in the Texas House of Representatives.

In this context, it is clear that the multi-member district plans for Dallas and Bexar Counties had only a local impact, and were not expressive of official, statewide policy. A three-judge court is not required to consider the constitutionality of that kind of state statute. Board of Regents v. New Left Education Project, 404 U.S. 541 (1972); Perez v. Ledesma, 401 U.S. 82, 86-88 (1971); Moody v. Flowers, 387 U.S. 97 (1967). Therefore, the district court was "acting in the capacity of a single-judge court" in its orders pertaining to Dallas and Bexar Counties, and consequently "there is no jurisdiction in this Court to review" those orders under Section 1253 (Perez v. Ledesma, supra, 401 U.S. at 86).

2. In any event, the district court did not err in holding that the House redistricting plan was unconstitutional or in ordering single-member districts for Dallas and Bexar Counties.

A. The House redistricting plan for the State, according to appellants' own computations, involves a population deviation of 9.9 percent. Appellants' contention that this deviation is within permissible limits and is justified by valid policy considerations is insupportable. This Court has indicated that in congressional districting, "the State [must] make a good-faith effort to achieve precise mathematical equality. * * * Unless population variances among congressional districts are shown to have resulted despite such effort, the State must justify each variance, no matter how small." Kirkpatrick v. Preisler, 394 U.S. 526, 530-531 (1969). To be sure, "[s]omewhat more

flexibility may * * * be constitutionally permissible with respect to state legislative apportionment than in congressional districting" (Reynolds v. Sims, 377 U.S. 533, 578 (1964)); but "the overriding objective" in devising state legislative districts, as with congressional districts, "must be substantial equality of population among the various districts" (id. at 579), and the State must justify all deviations. See, also, Kilgarlin v. Hill, 386 U.S. 120 (1967); Swann v. Adams, 385 U.S. 440 (1967).

In the present case, as the district court pointed out, "the State has not attempted to explain in terms of rational state policy its failure to create districts equal in population as nearly as practicable, nor has the State sought to justify a single deviation from precise mathematical equality" (App. 14A). Appellants' claim that the population deviations are justified by "the State constitutional mandate for county integrity" (J.S. 10) was properly rejected by the court below as not supportable on the record here, since in fact the policy of preserving county boundaries "has been blatantly violated" (App. 16A; see, also, id. at pp. 15A-21A, 33A-34A). Thus while, as appellants note (J.S. 11), this Court in Kilgarlin v. Hill, supra, indicated that a state policy requiring legislative apportionment plans to respect county boundaries wherever possible might justify some population deviation, in view of the abandonment of that policy as concerns the present plan "there is simply no credibility left in the rationale advanced by the State in Kilgarlin" (App. 34A).

Nor are appellants' other purported justifications persuasive. The suggestion that the present plan should be sustained because the deviations were the necessary

result of "practical politics" (J.S. 14) is squarely at odds with this Court's admonition in Kirkpartick v. Preisler, supra: "We agree with the District Court that 'the rule is one of "practicability" rather than political "practicality."' * * * Problems created by partisan politics cannot justify an apportionment which does not otherwise pass constitutional muster" (394 U.S. at 533). And appellants' assertion "that trivial variations 5 or 10 percent either way from the optimum, or even a little higher, should be set aside only when it can be shown such variations result in meaningful effect on the processes of government" (J.S. 17-18) is little more than an attempt to have the Court adopt a de minimis test, a course which it rejected in Kirkpatrick as "inconsistent" with the "whole thrust" of the equality of population standard (394 U.S. at 530).

B. Plenary review of the orders below requiring single-member districts for Dallas and Bexar Counties is not now warranted. Those orders were not stayed, and accordingly the State election process has gone forward pursuant thereto. Primary elections have been held, and general elections probably will be completed before this Court could review the decision below. As appellants pointed out in their stay application, the restructuring of representation incident to the decision below thus largely has been, or shortly will be, effected, and that cannot be undone. In this circumstance, there is no reason for further review of these orders.

Moreover, appellants' arguments concerning these orders are without merit. This Court has made clear that "when district courts are forced to fashion apportionment

plans, single-member districts are preferable to large multi-member districts as a general matter." Connor v. Johnson, 402 U.S. 690, 692 (1971). Despite this, appellants contend that the court below erred in ordering single-member districts for Bexar County, on the ground that Mexican-Americans, who the court found have been and are discriminated against, are not a minority and should not be entitled to favored treatment. Constitutionally-guaranteed equal protection does not require, however, that one be in a minority. Instead, the inquiry is whether a person, or an identifiable group, is treated differently than other, similarly situated persons or groups without justification. And especially in an apportionment case like this one, where the whole question is whether each person has an equal vote so that a majority of voters are assured of being able to elect the candidate of their choice, it is clear that there is no requirement that persons discriminated against be members of a "minority" in a numerical sense before they are entitled to receive what the Constitution demands, an equal vote. Appellants do not suggest that Mexican-Americans are not the subject of discrimination, or that single-member districts are not needed to remedy this situation. The court's order does not provide favored treatment for Mexican-Americans, as appellants claim, but merely gives them "a reasonable chance" to overcome "past and present discrimination" and to participate in elections (App. 56A).

The assertion that the order regarding Dallas County is not proper because there is no showing that the voting power of Negroes was diluted under the proposed plan does not comport with the record in this case or the district court's factual

findings. There is ample evidence establishing that the multi-member district in Dallas County discriminates against poor persons in that county as compared with persons in Harris County, where single-member districts are used (App. 27A-30A); that no viable state policy supports the unequal treatment thus accorded Dallas County citizens (App. 31A-35A); that the black community in Dallas County "has been effectively excluded from participation in the Democratic primary selection process" (App. 40A); and that the interests of that community have been inadequately represented in the State House of Representatives (App. 41A, 42A). On these facts, the court below correctly concluded that appellees met the standard set forth in Whitcomb v. Chavis, supra, of proving that the multi-member district in Dallas County "unconstitutionally operate[s] to dilute or cancel the voting strength of racial or political elements" (403 U.S. at 144).

CONCLUSION

For the foregoing reasons, the appeal should be dismissed, or, in the alternative, the judgment of the district court should be affirmed.

Respectfully submitted.

THOMAS G. GEE,

WM. TERRY BRAY,

Attorneys.

August 1972.

CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of this Motion to Dismiss or Affirm have been served upon each adverse party and each other party separately represented in this proceeding by United States air mail, postage prepaid, this 24th day of August, 1972, addressed to counsel for said parties at their respective post office addresses.

Wm. Terry Bray